IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Regular Second Appeal No.423 of 2001.
Judgment Reserved on:23.07.2007
Date of decision: 21.08.2007

Ravi Kant ….**Appellant**

Versus

Bhupender Kumar ….**Respondent**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Appellant: **Mr.Bimal Gupta, Advocate.**

For the Respondent: **Mr.Ramakant Sharma, Advocate.**

Dev Darshan Sud,J.

This is the defendant's appeal against the judgment and decree of the learned District Judge affirming the findings of the learned Sub Judge in a suit instituted by the respondent-plaintiff praying for permanent prohibitory injunction restraining the defendants-appellants from raising any construction over the suit land. The suit was amended during the pendency of the appeal and a decree for possession was prayed.

The respondent-plaintiff instituted a suit for permanent prohibitory injunction restraining and prohibiting the appellant-defendant Sita Ram (who was

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement?***

also a defendant in the suit) from raising any construction over the land comprised in Khasra No.397/204, measuring 3 bighas, situated in Mauza Bhatanwali, Tehsil Paonta Sahib, District Sirmaur on the allegations that the plaintiff-respondent is owner in possession of this land and the appellant Ravi Kant and his father have no right, title or interest in it. It was averred that they were strangers and were trespassing on the land, engaging in raising of construction etc. usurping the rights of the plaintiffs with their illegal activities. During the course of the trial, Sita Ram died and his name was deleted from the array of the defendants. The learned trial Court framed two issues. The first was as to whether the plaintiff is entitled to a decree for possession of the land as prayed for by them and second whether the claim of the defendants that they are in possession since 15.1.1953 is substantiated by the evidence on record. Both these issues were decided together and the learned trial Court held that the plaintiff was the rightful owner and that adverse possession as pleaded by the appellant-defendant, had not been established by clear and cogent evidence. An appeal before the learned District Judge proved unsuccessful. The defendant is now in second appeal before this Court.

This appeal was admitted on the following substantial question of law:

1. ***Whether the suit as a whole has abated for not bringing on record all the legal representatives of Sita Ram, defendant No.2, who died during the pendency of the suit?***

The learned District Judge, while dealing with the issues raised in the appeal, held that the name of Sita Ram had been deleted by the trial Court on 6.12.1999 and no objection was taken by the appellant who had willingly accepted the order. In the facts and circumstances, the learned Appellate Court proceeded to decide the appeal on the other points raised and held against the appellant.

The important point which needs to be considered is that before the learned trial Court no objection was taken regarding the legality of the judgment and decree on the basis that in the absence of the other purported legal heirs of Shri Sita Ram the decree was in-executable and a nullity. No factual foundation in the pleadings or in the evidence was laid by the appellant-defendant on this issue on which he now seeks adjudication before this Court. The issue was intentionally abandoned by the defendant-appellant, who had actively acquiesced in the order announced on 6.12.1999 and invited a judgment on the other material on record. Even in the amended written statement, filed after this order, no plea was raised by the appellant-defendant contesting the suit on the ground now raised in appeal.

The revenue record shows that the plaintiff is owner in possession of the land, but during the pendency of the suit, the defendant somehow happened to build a hut on the land and decree for possession was prayed for which amendment was allowed. The stand of the appellant and the deceased was that they are in possession of the land since 1953.

For the purposes of the present appeal, it is only the factum of representation of the estate of the deceased Sita Ram which is being considered. An application was made by the plaintiff before the learned Trial Court stating that Sita Ram, defendant No.2, was servant of defendant No.1 and had expired leaving behind no heirs. It further states that he was simply a trespasser and on his death the cause of action against him does not survive. No reply to this application has been filed neither has any objection been taken that representation of the estate of the deceased is inadequate or there is no representation at all. The application was allowed by the learned trial Court on 6.12.1999 which noted the fact that the defendant-appellant had no objection in allowing the application. This was the first stage at which the appellant-defendant has acquiesced in the order without reserving his right to contest this issue in the main suit. An amended written statement was filed on 4.5.2000 in which, no objection has been taken to

the non-joinder of necessary party. This was the second stage at which the objection could have been raised, but has been intentionally abandoned by the appellant-defendant. He went to trial with his eyes open having abandoned the plea before the court below (which he now seeks to raise in this appeal) he cannot now make a grievance of mistrial on the ground of non-joinder of necessary parties.

It is by now well settled that it is open to a party to waive his right under the law, even though the provision may be mandatory unless it is against public interest. The decree in the present case was passed against the appellant-defendant and was not a judgment in rem.

In ***Krishan Lal vs. State of J & K, (1994) 4 SCC 422,*** the question of waiver of a statutory right was considered by the Hon'ble Supreme Court. The Hon'ble Supreme Court considered the entire case law on the point and held:

> ***"16.*** *As to when violation of a mandatory provision makes an order a nullity has been the subject-matter of various decisions of this court as well as of courts beyond the seven seas. This apart, there are views of reputed text writers. Let us start from our own one time Highest court, which used to be Privy council. This question came up for examination by that body in Vellayan Chettiar v.*

government of the Province of Madras in which while accepting that Section 80 of the Code of Civil Procedure is mandatory, which was the view taken in Bhagchand Dagadusa v. secretary of State for India in council it was held that even if a notice under Section 80 be defective, the same would not per se render the suit requiring issuance of such a notice as a precondition for instituting the same as bad in the eye of law, as such a defect can be waived. This view was taken by pointing out that the protection provided by the Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right. A distinction was made in this regard where the benefit conferred was to serve "an important purpose", in which case there would not be waiver (see paragraph 14.

17. *This point had come up for examination by this court in Dhirendra Nath Gorai v. Shudhir Chandra Ghosh and a question was posed in paragraph 7 whether an act done in breach of a mandatory provision is per force a nullity. This court referred towhat was stated in this regard by Mookherjee, J. in Ashutosh Sikdar*

v. Behari Lal Kirtania at page 72 and some other decisions of the Calcutta High court along with one of Patna High court and it was held that if a judgment-debtor, despite having received notice of proclamation of sale, did not object to the non-compliance of the required provision, he must be deemed to have waived his right conferred by that provision. It was observed that a mandatory provision can be waived if the same be aimed to safeguard the interest of an individual and has not been conceived in the public interest.

18. *The aforesaid view was reiterated in Lachoo Mal v. Radhey Shyam in which it was stated, qua Section I-A of U. P. (Temporary) Control of Rent and Eviction Act, 1943, that the same being meant for the benefit of owner of buildings, if a particular owner did not wish to avail of the benefit of the section, there was no bar in his waiving the benefit. It was further observed in this connection in paragraph 8 that no question of policy, much less public policy being involved, the benefit or advantage could always be waived.*

19. *What has been held in Indira Bai v. Nand Kishore by a three-Judge bench speaking through Sahai, J.*

of this court is still more clinching inasmuch as in that case the right conferred on a pre-emptee by Section 8 of the Rajasthan Pre-emption Act, 1966 requiring a vendor to serve notice on persons having right of pre-emption as a condition of validity of transfer was held as amenable to waiver. It was pointed out that the nature of the interest created by the aforesaid section was a right of the party alone and not of the public as such. It was then observed that if it be a right of the party alone it is capable of being abnegated, as such a right cannot be said to involve any interest of community or public welfare so as to be in mischief of public policy.

20. *Having seen the pronouncements of judicial fora, we can now inform ourselves as to the view of the reputed authors on interpretation of statutes as well as administrative law. We may start with what has been stated in Maxwell's The Interpretation of Statutes. This aspect has been dealt at pages 328-330 (12th Edn.) and it has been stated that if the benefit be for the protection of an individual in his private capacity the same can be waived. To illustrate, reference has been made about waiver of the benefit*

of the Limitation Act. This is on the maxim of law "quilibet potest renunciare juri pro se introducto", meaning "an individual may renounce a law made for his special benefit". Maxwell then says that if the benefit be one which has been imposed in public interest there can be no waiver of the same.

21. *Craies in his Statute Law has opined the same, as would appear from what has been stated at page 269 of 7th Edn. By drawing attention to the aforesaid maxim, it has been observed that if the object of a statute is "not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable". To illustrate this principle, it has been stated that if the statutory condition be imposed simply for the security or the benefit of the parties to the action themselves, such condition will not be considered as indispensable and either party may waive it.*

22. *Crawford in his Interpretation of Laws takes the same view as would appear from pages 540-542 (1989 Reprint). The learned author while quoting the aforesaid maxim states*

at page 542 that requirement like giving of notice may be waived as the same is intended for the benefit of the person concerned.

23. *We may also refer to the views expressed by Francis Bennion in his Statutory Interpretation 1984, wherein this aspect has been dealt with at pages 27 et seq and it has been stated that if the performance of statutory duty be one which would come within the aforesaid maxim, the person entitled to the performance can effectively waive performance of the duty by the person bound. As an illustration mention has been made (at page 29 of decisions in Toronto Corpn. v. Russell and Stylo Shoes Ltd. v. Prices Tailors Ltd. wherein it was held that a duty to give notice of certain matters can be waived by the person entitled to notice, if there is no express or implied indication that absence of notice would be fatal."*

This decision was re-affirmed in ***Commissioner of Customs, Mumbai vs. M/s.Virgo Steels, Bombay and another, AIR 2002 SC 1745***, by the Hon'ble Supreme Court holding:

"9. *The next question for our consideration is : can a mandatory requirement of a statute be waived*

by the party concerned ? In answering this question, we are aided by a catena of judgments of this Court as well as of the Privy Council. We will first refer to the judgment of the Privy Council which has been consistently followed by the Supreme Court in a number of subsequent cases involving similar points. In Vellayan Chettiar v. Government of Province of Madras, the Privy Council held that even though S. 80, C. P. C. is mandatory, still non-issuance of such notice would not render the suit bad in the eye of law because such non-issuance of notice can be waived by the party concerned. In the said judgment, the Privy Council held that the protection provided under S. 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right.

10 *In the case of Dhirendra Nath Gorai and Sabal Chandra Shaw and Ors. v. Sudhir Chandra Ghosh and Ors. (1964 (6) SCR 1001), this Court followed the judgment of the Privy Council in Vellayan Chettiar (supra) and held that even though the requirement of S. 35 of the Bengal Money Lenders' Act is mandatory in nature, such mandatory requirement could be*

waived by the party concerned. On a true construction of S. 35 of that Act, this court held that the said Section is intended only for the benefit of the judgment debtor and, therefore, he can waive the right conferred on him under the said section.

11 *In the case of S. Raghbir Singh Gill v. S. Gurucharan Singh Tohra and Ors. (1980 Supp SCC 53), this Court negatived an argument that the requirement of S. 94 of the Representation of the People Act, 1951cannot be waived. This argument was based on the principle that public policy cannot be waived. Rejecting the said argument, this court held that the privilege conferred or a right created by a Statute, if it is solely for the benefit of an individual, he can waive it. It also held that where a prohibition enacted is founded on public policy, Courts should be slow to apply the doctrine of waiver but if such privilege granted under the Act is for the sole benefit of an individual as is the case under S. 94 of the Representation of the People Act, the person in whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waiver.*

12 *In Krishan Lal v. State of J and K (1994 (4) SCC 422), this Court while considering the requirement of furnishing copy of inquiry proceedings under S. 17 (5) of the J and K (Government Servants) Prevention of Corruption Act, 1962 held following the judgment in V. Chettiar's case (supra) and D. N. Gorai (supra) that though the requirement mentioned in S. 17 (5) of the Act was mandatory, the same can be waived because the requirement of giving a copy of the proceedings of the inquiry mandated by S. 17 (5) of the Act is one which is for the benefit of the individual concerned.*

13 *In Martin and Harris Ltd. v. 6th Additional Distt. Judge and Ors. (1998 (1) SCC 732) this court while considering the provision of S. 21 (1) (a) first proviso of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 negatived a contention advanced on behalf of the appellant therein that the said provision was for public benefit and could not be waived. It held that it is true that such benefit enacted under the said proviso covered a class of tenants, still the said protection would be available to a tenant only as an individual, hence, it gave the tenant concerned a locus*

poenitentiae to avail the benefit or not. It also held that the benefit given under the said section was purely personal to the tenant concerned, hence, such a statutory benefit though mandatory, can be waived by the person concerned. 1998 All LJ 200).

14 *From the ratio laid down by the Privy Council and followed by this Court in the above-cited judgments, it is clear that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of persons concerned and is for his benefit, the said person can always waive such a right."*

(Emphasis Supplied)

Precedent on the point need not to be multiplied further since the matter has now been settled beyond any pale of judicial controversy. The act of the defendant having adopted a deliberate course of action in abandoning his right of objecting to the maintainability of the suit at the stage; (a) when the application under Order 1 Rule 10 of the Code of Civil Procedure was allowed and when his right to file the reply was abandoned by him; (b) at the time when amended written statement was filed and no objection was taken therein, would clearly show that he has acted with deliberation and contemplation in

abandoning the right and cannot now be heard to complain about the violation of statutory provisions which inures for his benefit even though the requirement may be mandatory.

The matter can be considered from another angle. A point having been abandoned in pleadings and inviting a judgment on the strength of the record as it is before the trial Court cannot be allowed to be re-agitated in appeal.

In ***Shaikh Tufail Ahmad vs. Mt.Umme Khatoon and others, AIR 1938 Allahabad 145***, the High Court of Allahabad has held:

> *"It is argued on behalf of the defendant that the plea of Marz-ul-maut which was entertained and given effect to by the learned District Judge had not been raised in the pleadings or at any stage before the trial Court. It is also argued that the learned Judge has taken an erroneous view of what Marz-ul-maut is according to Mahomedan law. It is quite correct to say that the point was taken for the first time in appeal. It involves a question of fact and the defendant must have been prejudiced by the plea being taken at a late stage. The judgment of the trial Court does not show that this aspect of the case was discussed before it. The plaintiffs themselves produced no evidence to show that the lady was suffering from Marz-ul-maut. …. … … … … … … … … … We think that the plea*

should not have been entertained at that stage."

To similar effect, in ***Gowardhandas Rathi*** *vs.* ***Corporation of Calcutta and another, AIR 1970 Calcutta 539,*** the Hon'ble High Court of Calcutta held:

"21. … … … … … … … … … In support of that assumption, however, there are no materials on the present record and no such contention appears to have been raised in the court below, either in the pleading or in the argument there. … … … … … … … … … … … … …"

The Hon'ble Supreme Court in ***M.P. Shreevastava vs. Mrs.Veena, AIR 1967 SC 1193,*** has held that a plea abandoned before the Courts below, cannot be allowed to be raised in appeal before this Court. It was held:

"4. It was never argued on behalf of the appellant in the Court of First Instance and the High Court that attempts proved to have been made by the respondent to resume conjugal relations could not in law amount to satisfaction of the decree, and we do not think we would be justified at this stage in allowing that question to be raised for the first time in this Court."

Similarly, in **Shanbhagakannu Bhattar** vs. **Muthu Bhattar and Another, (1972) 4 SCC 685,** it is held:

> ***"4.*** *The matter was taken in second appeal to the High Court. Kailasam J. has stated in unequivocal terms in his judgment that the only question that was argued before him on behalf of the plaintiff was that the will and the gift were invalid because pooja rights and inam rights were inalienable except to the immediate heir and that too without consideration. As by the gift the properties were not given to the immediate heir the gift was not valid. The learned Judge discussed mainly the various decisions of the Madras High Court and upheld the decision of the first appellate court that the gift deed was valid. An appeal was filed under clause 15 of the Letters Patent to a Division Bench by the plaintiff. Before the Division Bench the plaintiffs counsel sought to raise a new point that the alienation relied upon, though termed as a deed of gift, was in fact an alienation for consideration and therefore invalid within the well established principles. This point was permitted to be raised because it was considered that the determination of the question did not depend upon the decision as to, facts which were in dispute. … … … … … … … … … … … … … … … … … … The bench came to the conclusion that by reason of the*

discharge of the encumbrance the donee relieved from the encumbrance properties other than those which were the subject-matter of the gift. It was consequently held that the alienation evidenced by ext. B-9 which purported to be a deed of gift was for consideration. The real question on which the litigation had been fought in all the courts was decided because of the above conclusion."

"5. *We are wholly unable to appreciate how on any principle or authority the Division Bench had, in an appeal under the Letters Patent, allowed a point which involved not only law but also facts to be agitated when that point had never been taken even in the plaint or before the trial court, the first appellate court and the High Court in second appeal. It had not been raised even in the memorandum of appeal at any stage. … … … … … … … … … … … … … … It was never pleaded, asserted or claimed by the plaintiff that any consideration had passed for the properties which were the subject matter of the gift by Parvathiammal in favour of Duraiswami. In such a situation it was not open to the Division Bench of the High Court to allow the question of consideration to be raised for the first time and that also without any amendment of the pleadings being allowed and*

without the defendants having a proper opportunity to meet the case.

(Emphasis supplied)

In ***Chevalier I.I. Iyyappan and another vs. The Dharmodayam Co., Trichur, AIR 1966 SC 1017,*** the Hon'ble Supreme Court has held:

> ***"8.*** *The appellant in this Court has mainly relied on the plea that he had been granted a license and acting upon the license he had executed a work of a permanent character and incurred expenses in the execution thereof and therefore under S. 60 (b) of the Indian Easements Act, 1882 (5 of 1882), hereinafter referred to as the 'act', which was applicable to the area where the property is situate and therefore the license was irrevocable. Now in the trial court no plea of license or its irrevocability was raised but what was pleaded was the validity of the trust in Exhibit X. In the judgment of the trial Court no such question was discussed. In the grounds of appeal in his appeal … … …

claiming any right to the building after accepting the offer of the appellant pursuant to which the appellant had expended a large amount of money."

In ***Karpagathachi and others vs. Nagarathinathachi, AIR 1965 SC 1752***, the Hon'ble Supreme Court has held:

"4. The second contention of Mr.Viswanatha Sastry must also be rejected. A partition may be effected orally. By an oral partition, the two widows could adjust their diverse rights in the entire estate, and as part of this arrangement, each could orally agree to relinquish her right of survivorship to the portion allottee to the other. In the trial Court, the suit was tried on the footing that the partition was oral, and that the two partition lists were merely pieces of evidence of the oral partition, and no objection was raised with regard to their admissibility in evidence. In the High Court, the appellants raised the contention for the first time that the two partition lists were required to be registered. The point could not be decided without further investigation into questions of fact, and in the circumstances, the High Court rightly ruled that this new contention could not be raised for the first time in appeal. We think that

the appellants ought not to be allowed to raise this new contention."

The principle of abandonment of an issue has been considered in ***Mohammed Seraj vs. Adibar Rahaman Sheikh and others, AIR 1968 Calcutta 550,*** where the High Court of Calcutta held that once an issue is not pressed before the trial Court, it is not open to the party to agitate it before the appellate Court. It has been held:

> ***"16.*** *… … … … … … … … … … … … … … Now, once an issue is not pressed before the trial court, it is not open to the party doing so, to agitate it over again in the court of appeal … … … … … … … … … … … … … … … … …"*
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> ***(Emphasis Supplied)***

A Full Bench of Kerala High Court considered the matter in ***Velayudhan Gopala Panickan vs. Velumpi Kunji, 2nd Plaintiff, AIR 1958 Kerala 178***, holding that:

> ***"8.*** *The next aspect to be considered is whether the appellants who had given up their objections to the maintainability of the suit when it came up for hearing, are entitled to agitate the matter again in the appellate court. The lower appellate court answered the question in favour of the appellants. The two reasons which weighed with that court for taking up such a stand are: (1) that*

the contentions raised by defendants 63 and 64 related to a question of law, and (2) that their counsel had no authority to give up that contention.

These reasons do not appeal to us. No abstract question of law is involved in the objection to the maintainability of the suit. As we have already explained the Court was bound to go into the question of the maintainability of the suit only if the contesting defendants persisted in their objection to the plaintiffs' claim for compulsory partition. It was perfectly open to these defendants to withdraw their objection and thus to agree to the plaintiffs getting their shares and going out of the tarwad in case they succeeded in making out their claim as members of the common tarwad.

At the stage of the hearing of the suit, the contesting defendants chose to adopt such a course, as is obvious from paragraph 57 of the trial court judgment. There it is stated that the objection that the suit is not maintainable under the Ezhava Act was not pressed at the time of arguments. It has to be presumed that the defendants' counsel gave up that contention as per instructions from them. There is nothing to show that the counsel acted on his own responsibility in that matter. No such complaint appears to have been raised before the lower appellate court by defendants 63 and 64 while preferring

their appeal against the trial court's decree. … … … … … … … … … … … … … … …"

Lastly, the decision of the Hon'ble Supreme Court in ***The Sales Tax Officer, Banaras and others vs. Kanhaiya Lal Makund Lal Saraf, AIR 1959 SC 135***, may be noticed. In this case, the Hon'ble Supreme Court was seized of an appeal against the judgment and order of the High Court. The points sought to be urged in support of the appeal had been abandoned before the High Court. In these circumstances, the Hon'ble Supreme Court held that they could not be raised or agitated in appeal.

The record of the trial Court shows a clear and unequivocal abandonment of the issue available to the defendant-appellant. No foundation having been laid in the amended written statement which was filed after the death of defendant No.2, no right claimed on behalf of the deceased, nor any foundation laid for the proposition that the suit was bad for non-joinder of necessary parties, maintainability of the suit and that it must fail and that decree passed would be a nullity because of insufficient representation of the estate of the deceased; no evidence having been led on this point, the appellant cannot now be allowed to raise this point.

I have referred to the pleadings of the defendant before the learned trial Court to show that

there was intentional abandonment. In the amended written statement the appellant has not taken an objection regarding the maintainability of the suit or the passing of conflicting decrees in case there is no legal representative in the suit. The written statement proceeds, on the basis of the acts complained of having been committed by the appellant himself and no right having accrued in favour of the deceased. The important point to be noticed is that the appellant having abandoned the objection now raised, both in the pleadings, evidence and arguments before the trial Court, cannot now complain of a mis trial of the suit. The appellate Court has also noticed that the matter proceeded with the consent of the defendant who invited a finding without objection. In these circumstances, I hold that the appellant having actively participated in the trial without raising the question which he now seeks to raise as a question of law, not leading any evidence or proving as a fact that the absence of the legal representatives of the deceased will cause passing of conflicting decree(s) or mistrial cannot now urge about the legality of the decree in the absence of the legal representatives of the deceased defendant No.1. Litigant cannot be allowed to take advantage of his own wrong where he approbates or reprobates in the same breath. A court of law is meant for just determination of the rights of the parties and not as

a Forum which can be manipulated at the whims of the litigant. In the facts and circumstances, I do not find any merit in the appeal. The question raised by the appellant is answered against him. The appeal is dismissed. There shall be no order as to costs.

August 21, 2007 **(Dev Darshan Sud)**
(aks) **Judge.**